BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID W. BAILEY Claimant	)	
VS.	)	Docket No. 1,023,376
CESSNA AIRCRAFT Self-insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the September 21, 2007, Review & Modification Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 4, 2007. David H. Farris, of Wichita, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that the issue of whether claimant had a general bodily disability was determined by the court on September 11, 2006, and that was a finding of a past fact that existed at the time of the decision. Accordingly, the ALJ found that the doctrine of res judicata applied and denied respondent's Application for Review & Modification of the Award.

The Board has considered the record and adopted the stipulations listed in the Review & Modification Award.

ISSUES

Respondent requests the Board reverse the ALJ's finding that it is not entitled to review and modification of claimant's award of work disability. Respondent argues that claimant is limited to two scheduled injuries for the parallel injuries to his wrists rather than a whole body functional impairment, citing *Casco*.[1] In support of this contention, respondent argues that under K.S.A. 44-528, the intent of review and modification is to

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

create a new award, which acts prospectively. Respondent further argues that review and modification does not require a change in claimant's condition or the presence of new facts and is, therefore, appropriate in a variety of situations regardless of claimant's underlying condition. Respondent contends that neither res judicata nor collateral estoppel apply under the facts of this case. Based upon these arguments, respondent requests the Board find that claimant's original award of work disability is excessive and that, under *Casco*, claimant is limited to an award for two scheduled injuries. Further, because claimant has already received benefits in excess of an award for two scheduled injuries, respondent requests that under K.S.A. 44-528(d), the Board certify an overpayment of benefits to the Workers Compensation Fund.

Claimant argues that *Casco* does not apply in this case and that to allow respondent to retroactively apply new case law to a previously final award would unconstitutionally impair claimant's due process right to have the substantive law in effect at the time of the final award applied to his case thereafter. Claimant also argues that the remedy of review and modification is a prospective one and that K.S.A. 44-528 cannot be used as a means to challenge payments already made. Claimant asserts that the doctrine of res judicata applies, and that respondent cannot attack the past finding of fact that claimant suffered a whole body functional impairment. Claimant argues also that respondent is estopped from relitigating the issue of whether claimant suffered general bodily injuries and work disability. Claimant contends that respondent is not entitled to review and modification because K.S.A. 44-528 does not provide a remedy for a party to review and modify awards based upon a change in case law and statutory interpretation. Finally, claimant requests post award attorney fees for the time expended by his attorney in connection with this application for review and modification.

The issues for the Board's review are:

(1) Should the award in this case entered September 11, 2006, granting claimant work disability benefits be reduced to two scheduled injuries pursuant to *Casco*?

(2) If so, should the Board certify an overpayment of benefits to the Workers Compensation Fund?

(3) Is claimant's counsel entitled to post-award attorney fees?

FINDINGS OF FACT

Claimant was injured out of and in the course of his employment with respondent when he developed bilateral carpal tunnel syndrome. An Award was entered on September 11, 2006. The ALJ found claimant had a 10 percent impairment for each upper extremity which converted to a 12 percent impairment to the body as a whole. The ALJ then found that since claimant was laid off or medically terminated from respondent, he

was entitled to a work disability of 56 percent based on a 100 percent wage loss and a 12.2 percent task loss. No appeal was taken from this award.

On March 23, 2007, the Kansas Supreme Court entered its opinion in *Casco*, in which it held that scheduled injuries are the general rule and that injuries to parallel extremities are treated as two scheduled injuries rather than an injury to the body as a whole. Thereafter, respondent filed an Application for Review and Modification. In its brief to the ALJ, respondent cited *Casco* and claimed that claimant's Award is excessive because he is no longer entitled to work disability. Respondent requested the ALJ modify the Award to find that claimant was entitled to a 10 percent permanent partial impairment to each upper extremity, which would compute to an award of $17,569.37. Respondent further argued it had paid claimant in excess of $30,000 in permanent partial disability compensation and requested the ALJ terminate claimant's right to future benefits and certify that respondent has overpaid benefits.

Claimant argued that respondent's Application for Review and Modification should be denied, claiming res judicata, collateral estoppel, equitable estoppel, due process, and the law of the case. Claimant further argued that there has been no change in claimant's condition medically or in the terms of his employment and that the matter was not properly before the ALJ. The ALJ found that the doctrine of res judicata applied and denied respondent's Application for Review and Modification.

PRINCIPLES OF LAW

In *Casco*,[2] the Kansas Supreme Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

[2] *Id.*, Syl. ¶¶ 7, 8, 9, 10, 11.

> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.
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> K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

K.S.A. 44-528 states in part:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> . . . .
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Review and modification, however, is not available to relitigate all issues. In *Randall*,[3] the Kansas Supreme Court held that res judicata applies to foreclose "a finding of a past fact which existed at the time of the original hearing."

[3] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973).

This is not necessarily true of findings relating to the extent of claimant's disability. The extent of a claimant's disability resulting from an accidental injury, where the causal connection is established, at any given time must be based on evidence of the claimant's condition at that particular time.[4]

In *Morris*,[5] the Kansas Court of Appeals stated:

There is no doubt . . . that the purpose of the modification and review statute was to save both the employer and the employee from original awards of compensation that might later prove unjust because of a change for the worse or better in a particular claimant's condition. [Citations omitted.]

In *Gile*,[6] the Kansas Supreme Court stated:

Any modification is based on the existence of new facts, a changed condition of the workman's capacity, which renders the former award either excessive or inadequate [citation omitted]. The burden of proving the changed condition of the claimant is upon the party asserting it. [Citation omitted.]

In *Collier*,[7] the Kansas Supreme Court stated:

The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:

> "The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts."
> . . . .

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[4] *Id.* at 396-97.

[5] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979)

[6] *Gile v. Associated Co.*, 223 Kan. 739, 740-41, 576 P.2d 663 (1978).

[7] *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998).

> The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

In *Finical*,[8] the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

ANALYSIS

Although written in the disjunctive, the primary purpose of K.S.A. 44-528, the review and modification statute, is to permit awards to be reviewed and, if appropriate, modified when, due to a change in a claimant's physical condition or circumstances, *i.e.*, employment status or earnings, the original award has become either inadequate or excessive. In this case, there is no claim that claimant's condition or circumstances have changed. The only change is in the case law.

In *Casco*, the Supreme Court clarified prior interpretations of the Kansas Workers Compensation Act and ruled bilateral parallel extremity injuries should be compensated as separate scheduled injuries and not as injuries to the body as a whole. The law has not changed, but the court's interpretation of the law as it existed on the date of claimant's accident has changed since the entry of the ALJ's Award in this case. Nevertheless, the issue of whether claimant's injuries should be compensated as separate scheduled injuries or as a general body disability was decided in the original Award of September 11, 2006. That Award was not appealed and is final. Findings of past facts and past conclusions of law cannot be relitigated. The statutory interpretations that resulted in the ALJ's findings on the nature and extent of claimant's disability in the original award are the law of the case.

The doctrine of res judicata also applies to final workers compensation orders and awards where the issue is not subject to review and modification. Respondent argues res judicata does not apply to the issue of nature and extent of disability. But respondent is seeking to relitigate past findings of facts. Whether claimant's permanent partial disability should be compensated as two separate scheduled injuries under K.S.A. 44-510d or as a general body disability under K.S.A. 44-510e was decided in the original Award. That Award was not appealed and is final. Therefore, in the absence of new evidence or a change in claimant's circumstances or condition, review and modification is not a procedure for respondent to relitigate the original Award of permanent partial disability compensation.

CONCLUSION

Respondent has failed to prove that the Award entered on September 11, 2006, should be modified.

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[8] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

The ALJ did not make a determination concerning attorney fees in his September 21, 2007, Review & Modification Award.[9] Thus, there is no finding, conclusion or order for the Board to review. Claimant must present his request for attorney fees to the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 21, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant
P. Kelly Donley, Attorney for Self-insured Respondent
John D. Clark, Administrative Law Judge

[9] The Board notes that the ALJ also failed to approve claimant's attorney fee contract or award a fee for claimant's counsel in the September 11, 2006, Award.